



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED

Order Instituting Rulemaking into the Review of the
California High Cost Fund B Program.

R.06-06-028 12-17-07
(Filed June 29, 2006) 04:59 PM

**REPLY COMMENTS OF COX CALIFORNIA TELCOM, L.L.C.,
DBA COX COMMUNICATIONS ON COMMISSIONER CHONG'S
PROPOSED INTERIM OPINION IMPLEMENTING
CALIFORNIA ADVANCED SERVICES FUND**

Douglas Garrett
Cox Communications
2200 Powell St., Suite 1035
Emeryville, CA 94608
T: 510.923.6222
E: douglas.garrett@cox.com

Esther Northrup
Cox Communications
5159 Federal Blvd.
San Diego, CA 92105
T: 619.266.5315
E: esther.northrup@cox.com

Margaret L. Tobias
Mandell Law Group, PC
Three Embarcadero Center, Sixth Fl.
San Francisco, CA 94111
T: 415.869.6772
E: mtobias@mlawgroup.com
Attorney for Cox Communications

Dated: December 17, 2007

Table of Contents

I.	Introduction and Background.	1
II.	If Adopted, CASF Should Allocate Funds Only To Projects In Unserved Areas.	1
III.	The Commission Does Not Have Jurisdiction Over Broadband Services, And Therefore, Should Not Adopt Any Rule or Requirements Regulating Such Services, Including But Not Limited To Pricing Restrictions, Stand-Alone Broadband Service And The Imposition of Commission-Mandated Surcharges.	2
IV.	The Record Does Not Support The Commission Adopting TURN’s Suggestion That Broadband Services Be Available At 10 MBPS.	4
V.	Conclusion.	5

Table of Authorities

STATUTES

47 C.F.R. § 9.3.....	4
----------------------	---

ADMINISTRATIVE AGENCY DECISIONS

Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-4, Memorandum and Opinion and Order, 19 FCC Rcd 3307, FCC 04-027 (rel. Feb. 12, 2004)	3
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 12, 2004)	3, 4
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------

CASE LAW

<i>National Cable & Telecommunications Ass'n, v. Brand X Internet Services</i> , 545 U.S. 967 (2005); <i>Minnesota Public Utilities Comm'n. v. F.C.C.</i> , 483 F.3d 570 (2007) (8 th Cir. MN)	3
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

Summary of Cox's Recommendations

To the extent that the Commission adopts the CASF, Cox respectfully requests that the Commission adopt a narrowly tailored CASF that:

- Will fund deployment of broadband facilities only in unserved areas of the State;
- Is designed and administered on a competitively- and technology- neutral basis;
- Is consistent with the Commission's prior universal service goals and corresponding programs;
- Will not undermine the policies adopted in the Uniform Regulatory Framework, but rather, encourage and facilitate competition without reliance on end-user funded subsidies; and
- Will not be implemented in such a way as to fund the ILEC's upgrading their broadband facilities in areas where they already provide telephone and DSL broadband services or have committed to do so under their DIVCA franchise authority.

I. Introduction and Background.

Pursuant to the Commission's Rules of Practice and Procedure ("Rules"), Cox California Telcom, L.L.C., *dba* Cox Communications (U-5684-C) ("Cox") submits these timely reply comments on the proposed Decision of Commissioner Chong, titled "Interim Opinion Implementing California Advanced Services Fund" ("Proposed Decision" or "PD").

It is a rare day when all parties filing comments agree on a substantive matter pending before the Commission and submit consistent feedback on revising such matter. That day occurred when parties filed opening comments in response to the Proposed Decision and identified legal and otherwise substantive errors that prevent the Commission from adopting the Proposed Decision as issued. Cox submits these reply comments to highlight parties' unanimity on opposing the scope of the proposed CASF and to briefly respond to DRA's and TURN's proposals for CASF that, if adopted, would result in the Commission exceeding its jurisdiction.

II. If Adopted, CASF Should Allocate Funds Only To Projects In Unserved Areas.

All parties unanimously oppose the Proposed Decision's conclusion to allocate CASF funds to entities deploying broadband projects in areas where another broadband provider already offers service. AT&T, Verizon and the Small LECs (ILECs), TURN and DRA, (ratepayers), Cox, (a competitive wireline provider), CCTA (cable providers) and Sprint Nextel and T-Mobile (wireless carriers) all reject the Proposed Decision's unsupported conclusion to fund broadband deployment in "underserved" areas. It is telling that all of these parties, who have vastly different interests, agree that the Commission should limit CASF funds to broadband deployment in unserved areas only.

While all parties recognize the importance of increasing broadband deployment in areas of need, they also agree that the CASF program as proposed is the not the correct means for achieving this goal. Opening comments also make clear that the Commission cannot ignore record evidence and rely solely on sources outside the record to adopt the CASF.¹ Cox trusts that the Commission will consider the thoughtful and detailed analysis that parties submitted and elect not to adopt the CASF as proposed. If the Commission adopts CASF, the record in this proceeding makes clear that the Commission must limit CASF funding for broadband deployment in unserved areas, meaning those areas where no provider is offering any broadband services.²

¹ Comments of Pacific Bell Telephone Company D/B/A AT&T California (U 1001 C); AT&T Advanced Solutions Inc., (U 6346 C), AT&T Communications of California (U 5002), TCG San Francisco (U 5454 C), TCG Los Angeles, Inc. (U 5462 C), TCG San Diego (U 5389 C), and AT&T Mobility LLC (New Cingular Wireless PCS, LLC (U 3060 C), CAGAL Cellular Communications (U 3021 C) Santa Barbara Cellular Systems Ltd. (U 3015 C), and Visalia Cellular Telephone Company (U 3014 C) On Proposed Interim Decision Implementing California Advanced Services Fund, p. 6 (hereafter, "AT&T OC").

² As detailed in Cox's opening comments, to the extent the Commission concludes that CASF will fund both unserved and underserved areas, Cox recommends that underserved areas exclude any area where at least one broadband provider offers service with at least 128 kbps upstream.

III. The Commission Does Not Have Jurisdiction Over Broadband Services, And Therefore, Should Not Adopt Any Rule or Requirement Regulating Such Services, Including But Not Limited To, Pricing Restrictions Or Commitments, Stand-Alone Broadband Service Offerings And The Imposition of Commission-Mandated Surcharges On VoIP Services.

TURN and DRA both oppose the Commission establishing CASF, but submit recommendations for the program in the event the Commission concludes it has the authority to adopt CASF. TURN and DRA both suggest that the Commission adopt rules concerning pricing restrictions on broadband services³ and DRA recommends additional requirements concerning stand-alone broadband offerings, voice services provided over broadband networks (i.e. “VoIP service”) and broadband service speed and service quality.⁴ None of DRA’s or TURN’s proposed requirements can be lawfully adopted because the Commission lacks the authority to regulate broadband services.⁵ Moreover, none of the proposed requirements are necessary for the administration of CASF, and none would advance the deployment of broadband services. In fact, DRA’s and TURN’s proposed requirements would actually deter participation in CASF and otherwise curtail the deployment of broadband networks and services in California.

With regard to pricing, TURN and DRA propose that the Commission require a CASF recipient to comply with affordable prices set by Commission staff⁶ or otherwise voluntarily apply to adhere to price restrictions.⁷ TURN plainly states that the Commission has no authority to set prices for broadband access, but nonetheless suggests the Commission should do so on a *quid pro quo* basis.⁸ DRA appears to recognize that the Commission cannot regulate broadband prices and would have CASF applicants “voluntarily” agree to price commitments in their CASF funding applications.⁹ These proposals are misplaced as they effectively undermine the court’s and FCC’s decision to preempt state commissions from regulating broadband services. With respect to wireline broadband access, the courts and the FCC made clear that such services are not telecommunications, but rather, information services over which the Commission has no jurisdiction.¹⁰ And with respect to VoIP services, the FCC has preempted state commission from regulation of such, as discussed in more detail below. To the extent that the

³ Comments of The Utility Reform Network on Interim Opinion Implementing California Advanced Services Fund, p. 13 (hereafter, “TURN OC”).

⁴ Opening Comments of the Division of Ratepayer Advocates on the Proposed Decision Adopting the “California Advanced Services Fund”, pp. 8-9, 10 (hereafter, “DRA OC”).

⁵ See Opening Comments of Verizon Regarding Proposed Decision of Commissioner Chong Implementing California Advanced Services Fund, p. 13 (hereafter, “Verizon OC”); Comments of Sprint Nextel On Proposed Decision Implementing California Advanced Services Fund, pp. 8-9 (hereafter “Sprint Nextel OC”).

⁶ TURN, p. 13.

⁷ DRA OC, p. 9. For example, DRA would have CASF recipients comply with voluntary price commitments for voice services and stand-alone broadband service for at least 10 years with respect to low-income consumers and 5 years for other consumers.

⁸ TURN OC, p. 13.

⁹ DRA OC, p. 9.

¹⁰ *National Cable & Telecommunications Ass’n, v. Brand X Internet Services*, 545 U.S. 967 (2005); *Minnesota Public Utilities Comm’n. v. F.C.C.*, 483 F.3d 570 (2007) (8th Cir. MN) (upholding the FCC’s determination in FCC 04-267 not to classify DigitalVoice as an information service or a telecommunications service and preempting state commission regulation of such service and similar services). See also, Sprint Nextel Opening Comments, p. 8,

Commission determines it has authority to implement CASF, it has no authority to regulate broadband access services, VoIP services or the pricing for such.

While AT&T and Verizon may have voluntarily agreed to certain conditions or to make contributions to various funds previously, Cox understands that they did so in merger cases or other proceedings not categorized as quasi-legislative. When a utility applies for approval of a given transaction, it may be appropriate for the Commission to grant approval of a given request in light of the utility agreeing to certain conditions. A utility requesting approval of a given transaction via an application in a formal proceeding, however, is completely different from the Commission adopting general rules applicable to the entire industry in this proceeding. Adopting rules that require carriers to voluntarily comply with requirements that the Commission does not have the authority to adopt would allow the Commission to circumvent federal preemption and otherwise improperly extend the Commission's jurisdiction.

Concerned that VoIP providers will circumvent the Commission's current regulatory structure and bypass payment of surcharges required of "other intrastate telephone services," DRA also proposes that VoIP services provided over broadband facilities funded by CASF funds should be subject to the same surcharges that telephone corporations impose and collect on their intrastate telecommunications services.¹¹ Specifically, the FCC has not concluded that any VoIP services are telecommunication services, and thereby, potentially subject to Commission-imposed surcharges. In fact, the FCC has found that non-interconnection VoIP services, such as pulver.com's Free World Dialup, a service that allows its member to "talk[] with one another directly over the Internet as well as communicat[e] directly via video or text,"¹² is an information service (and thus, not subject to rules applicable to intrastate telecommunications services).¹³ When considering Vonage's DigitalVoice offering, the FCC expressly did *not* decide whether that service is an information service or a telecommunications service. Relevant to DRA's proposal, however, the FCC did effectively preempt state commissions from regulating services offered by interconnected VoIP service providers like Vonage,¹⁴ including rates.¹⁵ In light of the current and pending FCC

¹¹ DRA OC, p. 11.

¹² Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-4, Memorandum and Opinion and Order, 19 FCC Rcd 3307, FCC 04-027 ¶ 2 (rel. Feb. 12, 2004) (hereafter, "FCC 04-027").

¹³ Id.

¹⁴ See 47 C.F.R. § 9.3.

¹⁵ For example, the FCC concluded that "Indeed, the fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation." Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 ¶ 22 (rel. Nov. 12, 2004) (hereafter, "FCC 04-267").

decisions, the Commission may not require VoIP service providers to adhere to price restrictions or impose and collect surcharges.¹⁶

Finally, as Sprint Nextel demonstrates, regulating broadband prices will have negative effects, such as providers lacking the incentive to offer any improved services during such period.¹⁷ As such, even if the Commission could impose pricing caps and require certain service offerings, (or design a program whereby recipients voluntarily comply with certain requirements), it should not do so as it would deter deployment, contrary to the Commission's goal. As detailed above, the Commission must reject TURN's and DRA's suggestions to impose pricing requirements (or award funds only to those providers that agree to such), require VoIP service providers to offer stand-alone broadband, and impose and collect Commission-mandated surcharges.

IV. The Record Does Not Support TURN's Suggestion That Broadband Services Be Available At a 10 MBPS.

TURN submits that, to the extent the Commission adopts funding for broadband deployment, it should reject the 3 mbps /1 mbps benchmark, and instead fund state-of-the-art networks such that consumers will have access to symmetrical 10 mbps broadband services.¹⁸ TURN's proposal lacks the requisite factual support and is otherwise based on unsound public policy. Specifically, TURN advances a requirement for 10 mbps service, which would only be available over a fiber or coaxial network, because such speeds have been advertised as being available in the United States and CASF should fund only state-of-the-art networks.¹⁹ As parties detailed in their comments on the PD, the availability of 10 mbps broadband services generally in the United States or in other countries provides no substantive support for the Commission requiring California consumers to fund deployment of fiber and coaxial networks throughout California. As Verizon notes, even the PD's "proposed 3/1 benchmark is outside of market norms," and does not correlate with typical Internet usage.²⁰ Thus, higher speeds are even more outside the norm and should not be funded by CASF.

If CASF support is limited to unserved areas (as parties' comments demonstrate it should be), then under TURN's proposal CASF recipients would be required to deploy state-of-the-art networks throughout rural and remote parts of California (even though TURN recognizes that topography and vegetation may render deployment in these areas infeasible).²¹ Needless to say, this would be an extremely expensive undertaking and the record does not support ratepayers funding this type of broadband deployment. Just as important, such an undertaking is not

¹⁶ Even if the Commission could adopt such requirements, this is not the proper proceeding to do so. The Commission would need to give notice to all interested parties of any issues or rules that the Commission will considering adopting.

¹⁷ Sprint Nextel OC, p. 4.

¹⁸ TURN OC, pp. 7-10.

¹⁹ Id., p. 9.

²⁰ Verizon OC, pp. 2-4.

²¹ TURN OC, p. 7.

necessary to achieve universal service goals and TURN fails to establish otherwise. And to the extent CASF funds are allocated to underserved areas (which they should not be), TURN's proposal would allow multiple parties to overbuild existing broadband deployment. The comments of Cox and numerous other parties establish that the Commission should decrease (and by no means increase) the requisite speed proposed in the PD to ensure that the Commission does not subsidize a "new competitor" at the expense of the existing broadband provider or carriers providing voice services on a non-bundled basis.²² These comments, which are applicable to TURN's proposal, diligently explain why funding duplicative providers would be unfair, anti-competitive and would significantly disrupt the marketplace. Finally, TURN's proposal is not competitively-neutral in that carriers providing services over non-fiber networks²³ and wireless networks do not offer broadband services at such speed. For example, Sprint Nextel notes that its mobile EV-DO technology offers download speeds between 600 kbps and 1.4 MBPS and upload speeds of 300-500 kbps.²⁴ For the reasons above, the Commission should reject TURN's proposal.

V. Conclusion.

Cox appreciates the Commission's goal of ensuring that all Californians have access to voice-grade telephone service, as well as broadband services. Consistent with this goal, the Commission should allocate CASF funds only to providers deploying networks in unserved areas.

Dated: December 17, 2007

Respectfully submitted,

/s/

Douglas Garrett
Cox Communications
2200 Powell St., Suite 1035
Emeryville, CA 94608
T: 510.923.6222
E: douglas.garrett@cox.com

Esther Northrup
Cox Communications
5159 Federal Blvd.
San Diego, CA 92105
T: 619.266.5315
E: esther.northrup@cox.com

Margaret L. Tobias
Mandell Law Group, PC
Three Embarcadero Center, Sixth Fl.
San Francisco, CA 94111
T: 415.869.6772
E: mtobias@mlawgroup.com
Attorney for Cox Communications

²² See AT&T OC, pp. 4-9; Comments of the California Cable and Telecommunications Association On the Proposed Interim Opinion Implementing the California Advanced Services Fund, pp. 2-3 (hereafter "CCTA OC"); Comments of Omnipoint Communications, Inc., dba T-Mobile (U-3056-C), p. 12 (hereafter "T-Mobile OC"); Sprint Nextel OC, p. 4; and Verizon OC, pp. 4-7.

²³ Verizon OC, p. 3.

²⁴ Sprint Nextel OC, p. 1, fn. 2; See T-Mobile OC, p. 12.

DOCKET OFFICE

PROOF OF SERVICE

I, Margaret L Tobias, the undersigned, hereby declare that, on December 17, 2007, caused a copy of the foregoing:

**REPLY COMMENTS OF COX CALIFORNIA TELCOM, L.L.C.,
DBA COX COMMUNICATIONS ON COMMISSIONER CHONG'S
PROPOSED INTERIM OPINION IMPLEMENTING
CALIFORNIA ADVANCED SERVICES FUND**

in the above-captioned proceeding, to be served as follows:

☒ [X] Via email and US Mail to the Assigned Commissioner's Advisor

☒ [X] Via email and US Mail to Administrative Law Judge

☒ [X] Via email service to all parties included in the attached service

Dated: December 17, 2007 at San Francisco, California.

/s/

Margaret L. Tobias

Proceeding: R0606028 - CPUC - OIR INTO THE
Filer: CPUC
List Name: LIST
Last changed: December 12, 2007

ksaville@czn.com	douglas.garrett@cox.com	ens@loens.com
Aloa.Stevens@frontier.com	lmb@wblaw.net	anitataffrice@earthlink.net
jesus.g.roman@verizon.com	ll@calcable.org	mp@calcable.org
esther.northrup@cox.com	pucservice@dralegal.org	general@dralegal.org
cmailloux@turn.org	scratty@adelphia.net	joe.chicoine@frontiercorp.com
elaine.duncan@verizon.com	cborn@czn.com	mcf@calcomwebsite.com
rcosta@turn.org	beth.fujimoto@cingular.com	alk@cpuc.ca.gov
bnusbaum@turn.org	cindy.manheim@cingular.com	aba@cpuc.ca.gov
ndw@cpuc.ca.gov	trevor@roycroftconsulting.org	dgw@cpuc.ca.gov
david.discher@att.com	john.frentrup@sprint.com	gtd@cpuc.ca.gov
michael.foreman@att.com	PHILILLINI@aol.com	jjs@cpuc.ca.gov
peter.hayes@att.com	don.eachus@verizon.com	kar@cpuc.ca.gov
Stephen.h.Kukta@sprint.com	jacque.lopez@verizon.com	lah@cpuc.ca.gov
thomas.selhorst@att.com	mshames@ucan.org	ma1@cpuc.ca.gov
pcasciato@sbcglobal.net	marcel@turn.org	nxb@cpuc.ca.gov
jclark@gmssr.com	rudy.reyes@verizon.com	ncl@cpuc.ca.gov
mtobias@mlawgroup.com	Kristin.L.Jacobson@sprint.com	psp@cpuc.ca.gov
mschreiber@cwclaw.com	mtobias@mlawgroup.com	rwc@cpuc.ca.gov
smalllecs@cwclaw.com	jwiedman@goodinmacbride.com	rwh@cpuc.ca.gov
suzannetoller@dwt.com	deyoung@caltel.org	trp@cpuc.ca.gov
ens@loens.com	mmattes@nossaman.com	tch@cpuc.ca.gov
tlmurray@earthlink.net	katiensel@dw.com	randy.chinn@sen.ca.gov